

**SC87495**

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**IN THE SUPREME COURT OF MISSOURI**

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**State of Missouri ex rel.  
Riverside Pipeline Company, L.P., and  
Mid-Kansas Partnership,**

**Respondents,**

**v.**

**Public Service Commission  
of the State of Missouri,**

**Appellant.**

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**Appeal from the Circuit Court of Cole County, Missouri  
Case No. 02CV324478  
The Honorable Thomas J. Brown III**

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**SUBSTITUTE BRIEF OF RESPONDENTS**

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## **JURISDICTIONAL STATEMENT**

Appellant Missouri Public Service Commission filed this appeal to the Missouri Court of Appeals, Western District, under § 386.540, R.S.Mo. to contest the Cole County Circuit Court's June 9, 2003 Order and Judgment, which found that the Public Service Commission erred as a matter of law. After Opinion by the Court of Appeals, this Court exercised its jurisdiction to review that decision under its Transfer Order dated April 11, 2006 pursuant to Rule 83.04. Though the Commission filed this appeal, Riverside Pipeline Company, L.P. and Mid-Kansas Partnership are deemed the appellants for briefing purposes under Rule 84.05(e).

### **STATEMENT OF FACTS<sup>1</sup>**

Respondents Riverside Pipeline Company, L.P. (Riverside) and Mid-Kansas Partnership (MKP) contracted with Missouri Gas Energy (MGE) to supply and transport natural gas to MGE's distribution system serving Kansas City, Missouri in February 1995. MGE is a utility subject to the jurisdiction of the Public Service Commission (PSC). Periodically, the PSC conducts an Actual Cost Adjustment

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<sup>1</sup> This Statement of Facts quotes at length the Court of Appeals' opinion in a related case styled *State ex. rel. Riverside Pipeline Co. v. Public Serv. Comm'n*, 26 S.W.3d 396 (Mo. App. 2000), with cites to the record on appeal added.



(ACA) review to determine what costs public utilities are allowed to recover from their customers.

In May 1996, MGE, Riverside, MKP, Western Resources, the Office of the Public Counsel, and the Staff of the PSC signed a Stipulation and Agreement (the Stipulation) settling disputes arising out of the PSC's ACA review of MGE's gas contracts. Schedule DML 1 to Ex. 5 (Appendix 1). On June 11, 1996, the PSC issued an order approving the Stipulation. L.F. 15-17.

On June 25, 1996, a PSC order established Case No. GR-96-450 to follow the over-recovery or under-recovery of MGE's gas costs for the Annual Reconciliation Adjustment Account period from July 1, 1996 through June 30, 1997. L.F. 17-18. Riverside and MKP intervened in the case before the PSC as suppliers of natural gas transportation and natural gas to MGE because under certain circumstances Riverside/MKP could be obligated to reimburse MGE for amounts it paid them that were later disallowed by the PSC. L.F. 11. The PSC Staff challenged the prudence of the contract between MGE and Riverside/MKP on June 1, 1998. The Staff argued that the execution of the contract between MGE and Riverside/MKP was not prudent and recommended a \$4,532,449.60 reduction in MGE's gas costs incurred under the contracts with Riverside/MKP.<sup>2</sup> L.F. 20.

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<sup>2</sup> This amount was later reduced to \$3,490,082.81.

On July 31, 1998, Riverside/MKP filed a motion to dismiss Case No. GR-96-450, asserting that the 1996 Stipulation barred the Staff's proposed prudence disallowance and that the PSC lacked jurisdiction to relitigate the terms of the Stipulation. L.F. 12. Riverside/MKP subsequently filed a second motion to dismiss based on insufficiency of the Staff's direct testimony on August 27, 1998. The PSC denied both motions to dismiss on September 29, 1998. L.F. 13.

In response, Riverside/MKP filed applications for rehearing with the PSC and also filed a petition for writ of prohibition in the Cole County Circuit Court, seeking to prevent the PSC from examining the prudence of the contracts between Riverside/MKP and MGE. The circuit court granted a preliminary order of prohibition, and the PSC thereafter moved to quash the writ on the ground that the PSC should be given the opportunity in the first instance to rule on the meaning of the 1996 Stipulation. L.F. 13-14.

The circuit court granted the PSC's motion to quash on December 2, 1998. The circuit court found that a portion of the Stipulation was ambiguous and that the PSC "should, in the first instance, determine if it has jurisdiction of the cause after hearing evidence and argument of the parties before it." L.F. 106. The PSC then, without taking evidence or further argument, issued an order denying both applications for rehearing on December 22, 1998. L.F. 13-14.

Riverside/MKP filed a petition for writ of review under § 386.510 with the circuit court on January 15, 1999. On July 26, 1999, the circuit court reversed the PSC's order and decision of September 29, 1998 denying Riverside and MKP's motion to dismiss. L.F. 96. The circuit court found the PSC's decision was "unlawful, unreasonable, arbitrary, capricious and not based on substantial and competent evidence on the whole record." L.F. 101. The court found, based on the record, that "the Commission acted unlawfully and/or unreasonably when it failed to make any finding that the 1996 Stipulation and Agreement was ambiguous, yet interpreted the Stipulation and Agreement without hearing any testimony or otherwise receiving any evidence to determine the intent of the parties to the Stipulation and Agreement." L.F. 101. In addition, the circuit court found the PSC:

- a. failed to make legally sufficient findings of fact or conclusions of law to permit a reviewing court to determine the specific findings made by the Commission and the basis on which those findings were purportedly made;
- b. failed and refused to receive or consider any evidence interpreting the Stipulation and Agreement;
- c. made a specific finding with no legally sufficient evidence on which to base that decision; and,

- d. denied rehearing despite all reasons set forth above, and despite this Court's [the circuit court] December 2, 1998 Order finding the Stipulation and Agreement to be ambiguous.

L.F. 102.

The circuit court remanded the cause to the PSC for further action consistent with its order, "including the interpretation of the 1996 Stipulation and Agreement in accordance with the rules of construction and the need for a sufficient and appropriate evidentiary basis for resolution of any language found to be ambiguous." L.F. 102.

On August 4, 1999 Riverside and MKP filed their notice of appeal of the circuit court's July 26, 1999 judgment, which remanded the cause to the PSC. L.F. 14. On July 25, 2000, the Court of Appeals dismissed the appeal for lack of a final and appealable PSC order. *State ex rel. Riverside Pipeline Co., L.P. v. Public Serv. Comm'n*, 26 S.W.3d 396 (Mo. App. 2000). On remand, the circuit court remanded the proceeding to the PSC in compliance with the Court of Appeal's mandate "for further proceedings not inconsistent with the opinion of the Court of Appeals and the orders of this Court." L.F. 104.

On remand, the PSC held a five day evidentiary hearing in September 2001 where the PSC received parol evidence on the parties' intent in drafting the Stipulation and also received evidence on the merits of the Staff's proposed

prudence disallowance. L.F. 14. The list of issues to be determined by the PSC in the hearing included whether the Stipulation barred the proposed adjustment. (ROA PSC Case Papers Vol. I, p. 108).

Seven months later, the PSC issued its Report and Order. L.F. 7 (Appendix 2). The PSC declared that it was unable to determine whether the Stipulation barred Staff's proposed disallowance in this case and future ACA prudence reviews of the decisions associated with the execution of the "Missouri Agreements" covered by the Stipulation.<sup>3</sup> L.F. 33. The PSC then advanced to the merits of the case and rejected the Staff's proposed prudency disallowance for the ACA period covered in Case No. GR-96-450. L.F. 37.

Riverside-MKP filed an application for rehearing with the PSC to once again request a ruling on the meaning of the Stipulation. L.F. 41. The PSC denied the application by majority vote. L.F. 48 (Appendix 3). Commissioner Connie Murray dissented from the ruling of the PSC denying the application for rehearing and expressly stated that the PSC erred in not finding that the Stipulation "bars the

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<sup>3</sup> The "Missouri Agreements" were defined in the stipulation to include the Sales Agreement dated February 24, 1995, between MGE and Mid-Kansas (the MKP II Interim Firm Gas Sales Contract) and the transportation agreement of the same date between MGE and Riverside (Riverside I).

Staff's proposed disallowance in this case and precludes any further ACA prudence review of the decisions associated with the execution of the Missouri Agreements." L.F. 53 (App. 3). Commissioner Murray based her dissent in part on the fact that "[t]he Staff and Office of the Public Counsel agree with Riverside/MKP that the Commission was obligated on remand to construe the meaning of the 1996 Stipulation and Agreement" and on the fact that the PSC's failure to construe the Stipulation leaves the parties "in the untenable position of having to relitigate the issue year after year." L.F. 53 (App. 3).

Riverside/MKP then filed a petition for writ of review in the Cole County Circuit Court. L.F. 1. The circuit court issued the writ of review. L.F. 58. On June 9, 2003, the circuit court issued its Order and Judgment, holding that the PSC erred in refusing to interpret the Stipulation and held that the Stipulation "(i) barred the Staff's proposed disallowance in this case, and (ii) precludes any further ACA prudence review of the decisions associated with the execution of the Missouri Agreements and (iii) only permits review of compliance and operational matters." L.F. 145, 158. The court then ordered the PSC "to limit any future proceedings to questions which have arisen or may arise regarding compliance and operational matters under the contracts resolved by the Stipulation..." L.F. 158.

On July 13, 2003, the PSC filed its notice of appeal. L.F. 159. Because of Rule 84.05(e), the PSC, which filed the appeal, proceeded as the respondent and

Riverside/MKP proceeded as the appellants for briefing purposes. After full briefing and oral argument, the Court of Appeals, Western District, dismissed the appeal, finding that Riverside/MKP were not aggrieved parties under § 512.020 and thus lacked standing to file an appeal. (Appendix 4).

This Court accepted transfer under Rule 83.04 and reversed the Court of Appeals' Opinion, finding that "the circuit court had jurisdiction to entertain the petition for review" and the Court of Appeals "had jurisdiction to entertain the PSC's appeal from the judgment of the circuit court." *State ex rel. Riverside Pipeline Co. v. Public Serv. Comm'n*, 165 S.W.3d 152, 156 (Mo. banc 2005) (*Riverside III*) (Appendix 5). This Court "retransferred to the court of appeals for consideration of the merits of the appeal." *Id.*

After re-transfer, the Court of Appeals again dismissed the appeal for lack of jurisdiction on the basis that it did not have a valid "Appellants Brief" before it given that Respondents filed the first brief and were not aggrieved. (Appendix 6). The Court of Appeals also suggested in dicta that the circuit court's judgment exceeded its jurisdiction because it "corrected" the decision of the PSC rather than "setting it aside" and therefore declared the underlying circuit court decision null and void. (App. 6).

On April 11, 2006, this Court accepted transfer under Rule 83.04 for a second time.

## **POINTS RELIED ON**

**I. The Court of Appeals Erred in Dismissing the PSC's Appeal Because Rule 84.05(e) Does Not Impose An “Aggrieved” Party Standing Requirement In That §§ 386.500.1 and 386.510 Permit Any "Interested" Person to Pursue Review of an Order of the Public Service Commission**

*Block v. Gallagher*, 71 S.W.3d 682 (Mo. App. 2002)

*State ex rel. Riverside Pipeline Co. v. Public Serv. Comm’n*,

165 S.W.3d 152 (Mo. banc 2005)

*State ex rel. Consumers Pub. Serv. Co. v. Public Serv. Comm'n*,

180 S.W.2d 40 (Mo. banc 1944)

*State ex rel. Southwestern Bell Tel. v. Brown*,

795 S.W.2d 385 (Mo. banc 1990)

§ 386.500

§ 386.510



**II. The PSC Erred in Reaching the Merits of the Staff's Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements**

*Knapp v. Missouri Local Government Employees Retirement Sys.,*

738 S.W.2d 903 (Mo. App. 1987)

*Liquidation of Professional Medical Ins. Co. v. Lakin,*

88 S.W.3d 471 (Mo. App. 2002)

*Parker v. Pulitzer Co.,* 882 S.W.2d 245 (Mo. App. 1994)

*Transit Cas. Co. in Receivership v. Certain Underwriters,*

963 S.W.2d 392 (Mo. App. 1998)

§ 536.070

**III. The Court of Appeals Erred in Declaring in Dicta that Circuit Courts in Missouri Lack Authority to Correct the PSC Because Circuit Courts Have the Authority to Correct the PSC In That § 386.510 Grants Circuit Courts Authority to Correct Any Order or Decision of the PSC**

*State ex rel. and to Use of Public Service Comm’n v. Blair,*

146 S.W.2d 865 (Mo. banc 1941)

*State ex rel. Riverside Pipeline Co. v. Public Serv. Comm’n,*

165 S.W.3d 152 (Mo. banc 2005)

*Wabash R. Co. v. City of Wellston,* 276 S.W.2d 208 (Mo. 1955)

§ 386.510

## **SUMMARY OF ARGUMENT**

The Court of Appeals' Opinion dismissed this appeal, for the second time, on procedural grounds that were not briefed or argued and that conflict with this Court's instructions on re-transfer to consider the case on the merits. The Court of Appeals' Opinion now not only conflicts with two other decisions of this Court, but with this Court's earlier decision in this very case.

The issues in this case are divided into two groups: (1) the substantive issues of the underlying dispute related to the interpretation of a stipulation entered into by the parties; and (2) the renewed jurisdictional/procedural issues raised by the Court of Appeals for the second time despite direction from this Court to consider the merits of the substantive issues in this case.

The procedural issues should be easily disposed of. This Court has held that Rule 84.05(e) simply reverses the briefing order and does not impose a substantive "aggrieved" party test for seeking review of an order of the PSC. The Court of Appeals erroneously relied on Rule 84.05(e) to substantively change the "interested" person standard set forth in § 386.500.1. Further, the Court of Appeals wrongly held that the circuit court exceeded its jurisdiction by "correcting" the PSC's Report and Order because § 386.510 expressly authorizes circuit courts to "correct" orders of the PSC.

With respect to the substantive issues, the PSC has acknowledged its obligation to determine the meaning of a 1996 Stipulation as a threshold jurisdictional matter. Nevertheless, and despite repeated instructions from the circuit court, the PSC failed to properly apply the rules of contract construction to resolve any ambiguities in the Stipulation and instead found that it was unable to determine the intended meaning. Had the PSC properly applied the rules of contract construction, it would have found that the Stipulation precludes any further ACA prudence review of the decisions associated with the execution of the “Missouri Agreements.”

Even though the PSC rejected its Staff’s proposed disallowance in Case No. GR-96-450, the PSC’s failure to determine the meaning of the Stipulation will require Riverside/MKP to re-litigate for each subsequent ACA period both the meaning of the Stipulation and the prudence of the execution of the pre-1996 gas supply contracts. Under the Stipulation, Riverside/MKP paid almost three million dollars to settle all disputes concerning the prudence of the decisions associated with the execution of the Missouri Agreements. An ambiguity in the Stipulation does not provide a basis to deny Riverside/MKP the consideration they received in the settlement—avoiding protracted litigation and yearly prudence reviews.

The circuit court properly construed the Stipulation as a matter of law. This Court should affirm the circuit court’s interpretation of the Stipulation.

## **ARGUMENT**

### **I. The Court of Appeals Erred in Dismissing the PSC's Appeal Because Rule 84.05(e) Does Not Impose An “Aggrieved” Party Standing Requirement In That §§ 386.500.1 and 386.510 Permit Any "Interested" Person to Pursue Review of an Order of the Public Service Commission**

#### **A. Standard of Review**

The proper interpretation of Rule 84.05(e), including whether it imposes an “aggrieved” party standing requirement in addition to the “interested” person standard set forth in §§ 386.500.1 and 386.510, is purely a question of law. “This Court will exercise its independent judgment in correcting errors of law.” *All Star Amusement, Inc. v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994).

#### **B. The "Aggrieved" Party Test Has No Application Here**

Though not originally raised by either party, the court of appeals in a prior related appeal determined *sua sponte* that it lacked jurisdiction to hear this appeal based on a finding that Riverside Pipeline Company (Riverside) and Mid-Kansas Partnership (MKP) were not “aggrieved” parties under § 512.020 and thus did not have standing to “appeal” the Report and Order of the Public Service Commission (PSC) to the circuit court. This Court accepted transfer and reversed the court of appeals on this point. *State ex rel. Riverside Pipeline Co. v. Public Serv. Comm’n*, 165 S.W.3d 152 (Mo. banc 2005) (*Riverside III*) (App. 5).

In *Riverside III*, this Court held that “[w]hether Riverside and MKP were ‘aggrieved’ by the decision of the PSC is of no consequence. The only determination necessary to establish appellate jurisdiction is whether the PSC was aggrieved by the judgment of the circuit court, and surely it was by virtue of the fact that the judgment was entered against it.” *Id.* at 155. This Court rejected the argument that Riverside and MKP needed to be aggrieved to seek review in the circuit court because § 386.500.1 (Appendix 7) and § 386.510 (Appendix 8) establish an “interested person” standard that governs throughout the judicial review process. *Id.*

As this Court held in *Riverside III*, under the Public Service Commission Act, when the PSC issues an order, any person "interested therein" has the statutory right to apply for a rehearing of that order. § 386.500.1. After a motion for rehearing is decided by the PSC, the party that applied for rehearing has the right to file a petition for writ of review with the circuit court "for the purpose of having the reasonableness or lawfulness of the original order or decision or the order or decision on rehearing inquired into or determined." § 386.510.

A circuit court's review of a PSC decision under § 386.510 is not an "appeal" but is instead a proceeding in equity. *See State ex rel. Southwestern Bell Tel. v. Brown*, 795 S.W.2d 385, 388 (Mo. banc 1990) ("We hold ... that review permitted under Section 386.510 is a separate action, and for purposes of procedural analysis,

not an appeal."). The circuit court's equitable review under § 386.510 is handled as a trial. *See* § 386.510 ("The circuit courts of this state shall always be deemed open for the trial of suits brought to review the orders and decisions of the commission as provided in the public service commission law and the same shall be tried and determined as suits in equity."). Here, the evidence was presented to the circuit court for its review and it exercised its review as an original proceeding.

The "interested" person standard of § 386.500.1 that governs the right to apply for rehearing of a PSC decision also governs "the right to be a party to review proceedings both in the circuit and appellate courts." *State ex rel. Consumers Pub. Serv. Co. v. Public Serv. Comm'n*, 180 S.W.2d 40, 46 (Mo. banc 1944). "[T]he Public Service Commission Act provides its own Code for proceedings for judicial review of its orders and ... the reference to the general code is only to make appeals subject to the usual rules of appellate procedure where procedure is not otherwise specified in the Act. This Act itself specifies who shall have the right to be a party to review proceedings both in the circuit and appellate courts." *Id.* at 45-46.

Here, § 386.510 specifically governs who may seek review of a decision or order of the PSC and permits any "interested" person to file a petition for writ of review. Indeed, it could not be otherwise. If standing to file a petition for writ of review were the same as standing to appeal, it would be technically impossible for

anyone to be "aggrieved" by an order of the PSC. As this Court recognized long ago, "the Commission is not a court and cannot enter a judgment or order that could act directly upon anyone's rights" and thus "no one could be aggrieved by an order of the Commission in the sense he would be by a court judgment ...." *State ex rel. Consumers*, 180 S.W.2d at 44.

This Court thus rightly held in *Riverside III* that the "aggrieved" party standard is "of no consequence" here.

**C. Rule 84.05(e) Does Not Impose An Aggrieved Party Standard**

Based on the Court's holding in *Riverside III* that "jurisdiction was proper in the court of appeals," the Court retransferred the case back to the court of appeals "for consideration of the merits of the appeal."

On retransfer, the court of appeals again dismissed for lack of jurisdiction finding that even if § 512.020 did not impose an aggrieved person standard, "it seems only logical" that such a standard is imposed by Rule 84.05(e), which reverses the briefing order in appeals from orders or decisions of the PSC. The court of appeals thus held that because respondents *Riverside* and *MKP* had filed the opening brief under Rule 84.05(e), as the court ordered them to do, and because *Riverside* and *MKP* were not aggrieved by the order of the PSC under review, the court had no valid appellants' brief before it and dismissed the appeal.



In *Riverside III*, however, this Court addressed the effect of Rule 84.05(e) and rejected the position adopted by the court of appeals. There, this Court held that Rule 84.05(e) “pertains only to the determination of which party files its brief first and how the parties are designated. It is a procedural rule that provides a more logical order for filing briefs, but it does not affect the designation of which party must establish standing in order to appeal.” *Riverside III*, 165 S.W.3d at 155. The purpose of Rule 84.05(e) is “that the agency decision is to be reviewed in the context of the circuit court’s judgment, which was a review of the agency decision in the first instance.” *Id.*

The court of appeals erroneously relied on the reference in Rule 84.05(e) to “the party aggrieved by the agency decision” to hold that this court rule imposes an aggrieved party standard. But this Court noted the confusion that could be caused by this language and held that “[i]n the context of the rule, the party aggrieved by the agency decision refers simply to the party entitled to judicial review in the circuit court.” *Riverside III*, 165 S.W.3d at 156. The court of appeals was thus wrong to construe Rule 84.05(e) to provide a heightened standard for obtaining review of a PSC decision beyond that provided in § 386.500.1.

Because Rule 84.05(e) does not change the standard for seeking judicial review of a decision of the PSC, the court of appeals’ opinion dismissing this case for lack of jurisdiction must be reversed and this case considered on its merits.

#### **D. Riverside and MKP Are Not Seeking an Advisory Opinion**

It is clear from the court of appeals opinion that it disliked the application here of the “interested person” standard set forth in § 386.500.1 because it viewed the PSC’s failure to render a jurisdictional ruling as moot given its rejection of the Staff’s proposed disallowance. The court thus expressed concern that it was being asked to render an advisory opinion. That is simply not true. First, the jurisdictional ruling was not rendered moot by the decision on the merits because a “jurisdictional ruling must be subject to appeal, even if it is not specified by statute, for otherwise there would be no review of a court’s jurisdiction.” *Barlow v. State*, 114 S.W.3d 328, 332 (Mo. App. 2003).

Second, the general prohibition against advisory opinions prohibits courts from deciding hypothetical disputes. *Block v. Gallagher*, 71 S.W.3d 682, 685 (Mo. App. 2002); *see also State ex rel. County of Jackson v. Missouri Pub. Serv. Comm’n*, 985 S.W.2d 400, 402-03 (Mo. App. 1999) (“A case is moot if a judgment rendered has no practical effect upon an existent controversy.”). The jurisdictional issue here is not hypothetical because there are at least eight more ACA cases *already filed and stayed* pending a determination of whether the PSC has jurisdiction to proceed. This determination will apply not only to this case but also to the other pending ACA cases. Indeed, the PSC would likely have argued that Riverside and MKP waived or were estopped from arguing the preclusive effect of

the Stipulation had they not pursued this appeal. It is not a theoretical possibility that this issue may present itself again, it already has presented itself repeatedly and the PSC is awaiting a ruling on the merits before determining whether to proceed to again consider Staff's proposed prudence disallowances respecting the Missouri Agreements in the other ACA cases for the years subsequent to 1996.

Third, the PSC included in its Report and Order a finding of fact and/or conclusion of law that the key provision of the Stipulation that Riverside and MKP paid \$3 million in consideration to support, was ambiguous and was thereby given no force or effect. In doing so, the PSC necessarily denied Riverside and MKP's primary contention that the PSC lacked jurisdiction to proceed with further ACA prudence reviews. As a direct result, Riverside and MKP have suffered and are currently being deprived of the consideration of their settlement agreement, which gives rise to an existing case or controversy through the PSC's wrongful exercise of jurisdiction over them in additional ACA prudence reviews.<sup>1</sup>

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<sup>1</sup> In *State ex rel. AG Processing, Inc. v. Thompson*, 100 S.W.3d 915 (Mo. App. 2003), the court found that a writ of prohibition was appropriate to address a jurisdictional question because of the "unwarranted expense and delay to the parties involved." *Id.* at 920 (quoting *State ex rel. T.J.H. v. Bills*, 504 S.W.2d 76, 79 (Mo. banc 1974)). Likewise here, the "unwarranted expense and delay" supports the ripeness of this dispute.

## **II. The PSC Erred in Reaching the Merits of the Staff's Proposed Disallowance Review Because Further Prudence Review of the Decisions Associated With the Execution of the Missouri Agreements Was Precluded In That The Stipulation Settled and Compromised the Prudence of the Missouri Agreements**

In 1996, Riverside, MKP and the Staff of the PSC, along with others, entered into a written settlement agreement entitled "Stipulation and Agreement" to resolve certain disputes between the parties. (App. 1). The Stipulation provides that, as consideration for Riverside/MKP paying almost three million dollars to MGE and dismissing a pending court action, "neither the execution of [certain agreements entered into by MGE's predecessor], nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review" throughout the terms of these agreements. The PSC entered an Order approving the Stipulation in 1996.

The Staff nevertheless initiated another prudence review, Case No. GR-96-450, of one of the Missouri Agreements. Despite the circuit court's instructions to construe the Stipulation and the list of issues filed with the PSC seeking an interpretation of the Stipulation, the PSC failed to do so and instead reached the merits of the Staff's proposed disallowance. This Court should find, just as a dissenting member of the PSC and the circuit court already have, that the

Stipulation (i) barred the Staff's proposed disallowance, (ii) precludes any further ACA prudence review of the decisions associated with the execution of the "Missouri Agreements", and (iii) permits review of compliance and operational matters only.

#### **A. Standard of Review**

"The role of [a] court in reviewing a decision of the PSC is to determine whether the PSC's order is lawful and reasonable." *State ex rel. Associated Natural Gas Co. v. Public Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo. App. 1997); § 386.510. Lawfulness "turns on whether the Commission had the statutory authority to act as it did." *Friendship Village of South Carolina v. Public Serv. Comm'n*, 907 S.W.2d 339, 344 (Mo. App. 1995). "When determining whether the Commission's order is lawful, the appellate courts exercise unrestricted, independent judgment and must correct erroneous interpretations of the law." *Id.* Like the circuit court's review below, the construction and interpretation of the Stipulation is a question of law for this Court to decide. *Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A.*, 803 S.W.2d 23, 32 (Mo. banc 1991).

Whether the PSC's decision is reasonable hinges on "whether the PSC's decision was supported by substantial and competent evidence on the whole record, whether the decision was arbitrary, capricious, or unreasonable, or whether the PSC abused its discretion." *Associated Natural Gas*, 954 S.W.2d at 529.

“Substantial evidence” means that the PSC’s order is based on “evidence which, if true, would have a probative force upon the issues, and necessarily implies and comprehends competent, not incompetent, evidence.” *State ex rel. Mobile Home Estates v. Public Serv. Comm’n*, 921 S.W.2d 5, 9 (Mo. App. 1996).

**B. The PSC’s Order Unlawfully Failed To Interpret the Stipulation**

The primary consideration that Riverside/MKP received in the Stipulation was the preclusion of future prudence reviews of the decisions associated with the execution of the Missouri Agreements. Nevertheless, the PSC Staff recommended a prudence disallowance under one of the Missouri Agreements in 1998 and continues to pursue other ACA prudence reviews and proposed disallowances on that basis for subsequent time periods.

The circuit court specifically instructed the PSC to construe the Stipulation but the PSC refused to do so and proceeded with the merits of the prudence review. L.F. 102 (circuit court remanded for “interpretation of the 1996 Stipulation and Agreement in accordance with the rules of construction”). After a second instruction from the circuit court to construe the meaning of the Stipulation before making a final determination on the merits of the prudence review, the PSC determined that it was unable to determine the meaning of the Stipulation and issued a final Report and Order rejecting the Staff’s proposed prudence disallowance for the ACA period covered in Case No. GR-96-450.

As a dissenting member of the PSC and the circuit court both found below, the PSC had no authority to reopen the issues settled by the 1996 Stipulation and thereby impose on the settling parties the same “substantial and expensive litigation” that the parties intended to end by the Stipulation. By failing to properly apply the rules of contract construction to determine the meaning of the Stipulation, the PSC nullified a significant part of the Stipulation.

**1. The Stipulation Precludes Prudence Review of the Decisions  
Associated With the Execution of the Missouri Agreements**

The Stipulation, like any other settlement agreement, must be construed using ordinary rules of contract construction. *See Liquidation of Professional Medical Ins. Co. v. Lakin*, 88 S.W.3d 471, 476 (Mo. App. 2002). A contract must be construed as a whole so as to not render any terms meaningless. *Transit Cas. Co. in Receivership v. Certain Underwriters*, 963 S.W.2d 392, 396 (Mo. App. 1998). A construction that gives a reasonable meaning to each phrase and clause and harmonizes all provisions is preferred over a construction that leaves some of the provisions without function or sense. *Id.* Even if an ambiguity is found, the most reasonable and fair construction should be adopted. *Industrial Bank & Trust Co. v. Hesselberg*, 195 S.W.2d 470 (Mo. banc 1946); *Paisley v. Lucas*, 143 S.W.2d 262, 267 (Mo. 1940). This latter rule of construction is founded on the fundamental notion of equity between the parties. *Tureman v. Altman*, 239 S.W.2d

304, 309 (Mo. banc 1951). The language of a contract should be given a fair, reasonable and practical construction because it is presumed that the parties contracted for fair, reasonable and practical results. *Id.* Finally, a contract should be construed against the party that drafted it—in this case the PSC Staff—and in favor of the party that did not. *Parker v. Pulitzer Co.*, 882 S.W.2d 245, 249 (Mo. App. 1994).

The language of the Stipulation at issue here is found in Paragraph 5, which states:

5. *As a result of this Stipulation, the Signatories agree that neither the execution of the MKP/WR Sales Agreement and the Riverside/WR Transportation Agreement I, nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review.* In addition, the Signatories agree that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be the subject of any further ACA prudence review until the case associated with the audit period commencing July 1, 1996 and ending June 30, 1997. The Missouri Agreements will be subject to the compliance and operational review of the Staff for all periods on and after July 1, 1994, and MGE's ACA balance



may be subject to adjustment as a result of such review.<sup>2</sup> The intent of the Signatories by this Stipulation is that the Commission, in adopting this Stipulation, issue an order holding that the transportation rates and gas costs charged pursuant to the Missouri Agreements shall not be disallowed by the Commission based on the reasons described above in this paragraph in Case Nos. GR-094-101, GR-94-227, GR-

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<sup>2</sup> As a result of the Commission's decision in Case No. GO-94-318, MGE is scheduled to have new tariffs in operation under an incentive PGA commencing July 1, 1996. Since those tariffs have not been submitted to the Commission, it is difficult to state with any certainty how they may relate to the settlement being effected by this Stipulation. However, it is the intention of the signatories that to the extent there are gas cost (non-transportation) issues involving any of the Missouri Agreements which are relevant to the time periods after July 1, 1996, those amounts will come under the Incentive PGA provisions as approved by the Commission. As a result, any issues related to gas costs associated with the Missouri Agreements will be subject to the provision that unless MGE's costs subject to the Incentive PGA provisions to be filed rise to the level where a prudence review is triggered, there will be no prudence review of the Missouri Agreements.

94-228, GR-95-82 and GR-96-78, and that the findings and conclusions regarding the prudence of the execution of the Missouri Agreements made by the Commission in Case No. GR-93-140 shall be compromised and settled as provided for herein. Although the prudence of entering into the MKP/WR Sales Agreement and the Riverside/WR Transportation Agreement I is finally settled by this Stipulation, additional questions may arise regarding the administration of the contracts by MGE and WR in Staff's compliance and operational review for all periods on and after July 1, 1994, as described above. Therefore, *this Stipulation is not designed to preclude the Staff from making proposed adjustments regarding issues involving the manner in which gas is actually taken under the contracts (e.g. gas which was available under the contract was not taken for some reason) or issues involving billing matters (e.g., MGE paid more than was required under the contract due to a billing or mathematical error)....*

App. 1 (emphasis added). Even if the Stipulation is ambiguous as the PSC found, its meaning nevertheless exists and must be determined.

At issue in this case is a prudence review of the decisions association with the execution of the "Missouri Agreements." Paragraph 4 of the Stipulation

defines the term “Missouri Agreements” to include a number of agreements, including the “Sales Agreement dated February 24, 1995, between MGE and MKP [MKP] ... hereinafter the ‘MKP II Interim Firm Gas Sales Contract’.” The Staff’s prudence disallowance rejected by the PSC in Case No. GR-96-450 concerned this MKP II agreement.

The first sentence of Paragraph 5 clearly prohibits a prudence review of the Missouri Agreements: “the Signatories agree that neither the execution of the MKP/WR Sales Agreement and the Riverside/WR Transportation Agreement I, nor the decisions associated with the execution of the Missouri Agreements shall be the subject of any further ACA prudence review.” Riverside/MKP rely on and seek to enforce this agreement.

Despite the plain and simple language in the first sentence of paragraph 5, the PSC was unable to determine the meaning of the Stipulation because the second sentence of paragraph 5 states that “the Missouri Agreements shall not be the subject of any further ACA prudence review until the case associated with the audit period commencing July 1, 1996 and ending June 30, 1997.”

But the meaning of the second sentence is illuminated by the next sentence, which in a footnote provides that “any issues related to gas costs associated with the Missouri Agreements will be subject to the provision that unless MGE’s costs subject to the Incentive PGA provisions to be filed rise to the level where a

prudence review is triggered, *there will be no prudence review of the Missouri Agreements.*” (Emphasis added). The prudence review at issue here was not triggered by MGE’s costs subject to MGE’s Incentive PGA, and thus was not within the authorized prudence review.

Paragraph 5 goes on to state that “the findings and conclusions regarding the prudence of the execution of the Missouri Agreements made by the Commission in Case No. GR-93-140 shall be compromised and settled ....” In exchange for compromising and settling the prudence of the decisions associated with the execution of the Missouri Agreements, Riverside/MKP paid almost three million dollars.

Further, the last two sentences of Paragraph 5 state the parties’ intent as to what the Commission is authorized to do in the future with respect to the Missouri Agreements, i.e., conduct compliance and operation reviews. Notably, the authority to conduct future prudence reviews of the decisions associated with the execution of the Missouri Agreements is not listed as within the authority of the PSC after approval of the Stipulation.

Construing paragraph 5 as a whole and giving meaning to all terms, as required by Missouri law, the Stipulation limits future review to issues pertaining to (i) how MGE used its gas purchases available under the terms of the agreement, and (ii) inaccurate billing/mathematical errors.

## **2. Parol Evidence Shows the Parties' Intent Was to Preclude Future Prudence Reviews**

To the extent an ambiguity remains after construing paragraph 5 as a whole, the parol evidence heard by the PSC favors the interpretation offered by Riverside and MKP. The evidence presented by the only witness involved in the final negotiation of the Stipulation supported the interpretation that future prudence reviews of the Missouri Agreements are barred by paragraph 5.

### **a. Mr. Langley's Testimony Proved the Parties' Intent**

Riverside/MKP presented the testimony of Mr. Dennis Langley, who personally participated in the final negotiations of the Stipulation. (ROA Tr. Vol. 3, pp. 456, 522). Mr. Langley unequivocally testified that the Stipulation (i) barred the Staff's proposed disallowance in this case and (ii) precludes any further ACA prudence review of the decisions associated with the execution of the Missouri Agreements while allowing other issues related to these agreements to come before the PSC for review, *i.e.*, certain compliance and operational matters. (ROA, Ex. 5, pp. 4-7). Mr. Langley testified:

Here is the way I would interpret it: From the date of the execution [of the Stipulation], everything was settled and nothing could be looked at until July 1 of '94 .... Beginning in July 1, '94 and thereafter, a smaller zone of prudence could be looked at, but it would

only be the zone that relates to compliance and operations as it's been described .... Then once you get to '96, it's even a smaller zone yet. It can only be those inside compliance and operations, and [only] if they've [MGE] vested their PGA standard .... that's the way Mr. Hack explained it to me. He was the drafter of the language.”

(ROA, Tr. Vol. 3, pp. 454-55).

Mr. Langley further testified that he would not have authorized such a significant settlement payment under the Stipulation as a mere stop-gap measure, but only committed this amount to forever resolve the prudence of the decisions associated with the execution of the Missouri Agreements. (ROA, Ex. 5, pp. 5-6). Riverside/MKP explained to the PSC's then-General Counsel during the negotiations that the first draft of the Stipulation was unacceptable because it did not settle the issue in perpetuity, to which the General Counsel responded that he was aware of Riverside/MKP's position and that he believed the following draft would be acceptable. (ROA, Ex. 5, pp. 7-8).

**b. Additional Testimony From Mr. Langley That Was  
Erroneously Excluded Further Proved the Parties'  
Intent**

Riverside/MKP also request this Court to consider under Rule 84.13 admissible testimony from Mr. Langley that was excluded from evidence by the

PSC's regulatory law judge even though no party objected to it. (ROA, Tr. Vol. 5, p.739; Vol. 3, pp. 387-88; Ex. 6, p. 2, line 20 through p. 3, line 15 and Schedule DML-8). This testimony has been preserved in the record of this proceeding for the Court's review. (ROA, Tr. Vol. 5, p. 741; Vol. 3, p. 382).

The stricken testimony from Mr. Langley specifically stated that Mr. Hack, the former general counsel for the PSC who actually drafted the Stipulation, supported his interpretation of the Stipulation. Mr. Langley's testimony in this regard was based on Mr. Hack's response to a data information request issued by the PSC Staff. Mr. Hack's response to the Staff's request follows:

Q. Please provide dates that negotiations were held, and Mr. Hack's recollection of the intent of the parties with regard to the prudence of the "Missouri Agreement."

A. Upon reviewing the May 2, 1996 Stipulation and Agreement, it is Mr. Hack's recollection that, by executing and filing the agreement, the parties intended that the MoPSC conclusively and finally resolve all issues associated with the prudence of the execution of the "Missouri Agreements" and that, on a going forward basis beginning with the ACA period commencing July 1, 1996, the only aspect of the "Missouri Agreements" that would be subject to the review and possible adjustment on

prudence grounds was the manner in which MGE operated under the “Missouri Agreement” (i.e., volumes taken, etc.). Compliance review (i.e., review of billing and payment accuracy), and possible adjustment on such grounds, was also preserved for the “Missouri Agreements” for periods beginning on an (sic) after July 1, 1994, by the intent of the parties in the May 2, 1996, Stipulation and Agreement.

L.F. 144.

Section 536.070 favors the receipt of evidence rather than its exclusion.

Subsection (8) states:

Any evidence received without objection which has probative value shall be considered by the agency along with other evidence in the case .... Irrelevant and unduly repetitious evidence shall be excluded.

The evidence at issue was only approximately one and a half pages in length and therefore could not be said to be unduly repetitious, and was clearly not irrelevant. Therefore, it should not have been excluded, and to do so was error.

“An administrative agency may not arbitrarily ignore relevant evidence not shown to be disbelieved. Only if it makes a specific finding that undisputed or unimpeached evidence is incredible and is unworthy of belief may it disregard such evidence.” *Knapp v. Missouri Local Government Employees Retirement Sys.*,



738 S.W.2d 903, 913 (Mo. App. 1987). Mr. Langley's testimony stands undisputed by any witness who personally participated in the final negotiations which led to the Stipulation, and accordingly cannot be ignored, as the PSC did in its Report and Order.

Riverside/MKP's interpretation of paragraph 5 of the Stipulation is the only interpretation that has been advanced that attempts to harmonize the entirety of paragraph 5. Further, it is the interpretation given to the Stipulation at the time of negotiation and execution by the primary Staff negotiator, who explained it as such to Mr. Langley when the Stipulation was being drafted. (ROA, Tr. Vol. 3, pp. 450, 455-56, 497; Ex. 5, pp. 6-9). This testimony shows it was the intent of the parties, including Staff, in agreeing to the Stipulation, that the decisions associated with the execution of the Missouri Agreements not be subjected to any further ACA prudence review. (*Id.*).

The primary purpose of parol evidence is to ascertain the intent of the parties. The excluded testimony citing Staff's own representative's testimony in the final negotiation and execution of the Stipulation should have been admitted to prove the parties' intent and to bolster Mr. Langley's testimony.

### **c. Staff's Witnesses Lacked Personal Knowledge**

Staff witness Mr. Shaw admitted that he did not know who authorized Mr. Hack to sign the Stipulation on behalf of Staff, but that it would have been

someone at the division director or executive director level. (ROA, Tr. Vol. 7, p. 1018). None of the Staff witnesses could or did testify to the parties' intent based on personal knowledge. In its Report and Order, the PSC appears to recognize this, stating that "there was no testimony indicating that they [Staff's witnesses] were directly involved in the final negotiations that led to the execution of the stipulation and agreement." L.F. 19.

Because no witness who testified contrary to Mr. Langley personally participated in the final negotiations, a finding that the Stipulation meant something other than what Mr. Langley testified would not be supported by competent and substantial evidence on the record and would be contrary to the overwhelming weight of the record evidence.

### **3. If All Else Fails, the Stipulation Should Be Construed Against the Drafting Party**

Even if the undisputed personal, first-hand knowledge of Mr. Langley was insufficient to interpret paragraph 5, the PSC erred in failing to determine the intended meaning of the Stipulation at all, rather than applying the final rule of contract construction--a contract should be construed against the party that drafted it and in favor of the party that did not. *Parker v. Pulitzer Pub. Co.*, 882 S.W.2d 245, 249 (Mo. App. 1994). "[T]he trier of fact should interpret the contract in the light most favorable to the party who did not draft the contract." *Id.* at 249-50.

It is undisputed on the record of this case that the Stipulation was drafted by the Commission's General Counsel, Mr. Hack, who was Staff's representative in the negotiations. (ROA, Ex. 5, pp. 7-8; Tr. Vol. 3, p. 455). Staff admitted this fact. (ROA, Ex. 6, Schedule DML-7). Accordingly, the Stipulation must be construed against Staff and in favor of Riverside/MKP.

### **III. The Court of Appeals Erred in Declaring in Dicta that Circuit Courts in Missouri Lack Authority to Correct the PSC Because Circuit Courts Have the Authority to Correct the PSC In That § 386.510 Grants Circuit Courts Authority to Correct Any Order or Decision of the PSC**

Despite the fact that the PSC has never contested the circuit court's authority to issue its order "correcting" the order of the PSC, the court of appeals nevertheless declared sua sponte, and in obvious dicta, that circuit courts in Missouri have no authority to "correct" orders or decisions of the PSC, but rather may only affirm or set aside the order. In so holding, the Opinion plainly misreads § 386.510.

Section 386.510 authorizes a circuit court to review decisions of the PSC and to "enter judgment either affirming or setting aside the order of the commission under review." That statute goes on to state that "to the extent herein specified," the circuit courts, the court of appeals, and the Supreme Court have "jurisdiction to review, reverse, correct or annul" the decision of the PSC. The phrase "to the extent herein specified" refers to the petition for writ of review process.

The Court of Appeals' Opinion references only the first part of the statute and voids the circuit court's judgment because it described its action as "correcting the PSC's order." This Court in *Riverside III*, though, properly described the

circuit court's judgment as "reversing the PSC." 165 S.W.3d at 154. Regardless of the semantics of the word used to describe the circuit court's action, the circuit court's judgment "correcting the PSC's order" was not void *ab initio* because the statute gives the circuit court authority to "correct" a decision of the PSC. *See Wabash R. Co. v. City of Wellston*, 276 S.W.2d 208, 209-10 (Mo. 1955) (§ 386.510 authorizes circuit courts to review, reverse, correct or annul an order of the PSC). Further, the Opinion contradicts this Court's finding in *Riverside III* that the circuit court had in fact reversed the PSC. 165 S.W.3d at 154.

Properly interpreted, the purpose of the limiting language of § 386.510 is not to preclude any action by the circuit courts on review, rather it only prohibits circuit courts from interfering with the original jurisdiction of the PSC. *State ex rel. and to Use of Public Service Comm'n v. Blair*, 146 S.W.2d 865, 868 (Mo. banc 1941). "[T]he Act removes the power of courts to enjoin the PSC or to pass upon such subject matter except in review of the proceedings of the Commission in the manner set forth in the Act." *Id.*

Because the plain language of § 386.510, and all relevant case law construing § 386.510, allows circuit courts to "correct" decisions of the PSC, the court of appeals Opinion holding otherwise should be set aside.

## CONCLUSION

The court of appeals wrongly held that Rule 84.05(e) creates an "aggrieved" party standard above and beyond the requirements for seeking review set forth in §§ 386.510 and 386.540. Under the plain language of these statutes, any "interested" person may file a petition for review, and the losing party may appeal that decision. The court of appeals also misread § 536.510 in finding that it precludes circuit courts in Missouri from "correcting" orders or decisions of the PSC.

On the merits of this case, construing the Stipulation using the appropriate rules of contract construction is a question of law for the Court. The circuit court engaged in the appropriate review and reached the right conclusion. For the reasons set forth above, Riverside and MKP request this Court to hold that the PSC erred as a matter of law in its Report and Order and issue an Opinion affirming the Judgment of the circuit court.

Respectfully submitted,

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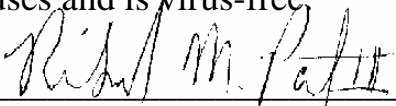
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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(B) & (G)**

The undersigned certifies that the foregoing brief complies with the limitations contained in Mo. R Civ. P. 84.06(b) and, according to the word count function of MS Word 2002 by which it was prepared, contains 9,099 words and 843 lines, exclusive of the cover, Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the diskette filed herewith containing this Substitute Brief of Respondents in electronic form complies with Mo. R. Civ. P. 84.06(g), because it has been scanned for viruses and is virus-free,

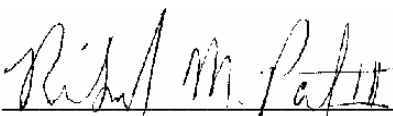
  
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**CERTIFICATE OF SERVICE**

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